SCOPE OF INQUIRY ON HABEAS CORPUS BY FUGITIVE FROM JUSTICE IN INTERSTATE RENDITION.—What is the scope of inquiry of a court on habeas corpus proceedings in interstate rendition on the question whether the relator is a fugitive from justice? In the recent case of *People ex rel. La Rocque* v. *Enright* (Sup. Ct. Special Term, 1921) 115 Misc. 206, 189 N. Y. Supp. 167, the relator, having been arrested under a rendition warrant of the Governor of New York upon the requisition of the Governor of Virginia, sued out a writ of habeas corpus. At the trial, he attempted to prove against contrary evidence that he was not in Virginia at the time of the alleged crime, and sought to be discharged on the ground that the weight of evidence was in his favor. In dismissing the writ, the New York court took a definite stand on a subject long victimized by dicta, yet by no means adequately settled.

The United States Constitution[1] provides for the interstate rendition of fugitives from justice, and supplementary legislation by Congress[2] describes the proper method. When a demand is made, it must appear to the governor of the state of refuge before he issues a warrant of extradition, first, that the accused is substantially charged with a crime; second, that he is a fugitive from justice;[3] and third, that he is the man sought.[4] The problem arises whether the courts may question the governor's determination that the accused is a fugitive from justice within the purview of the statute.[5] It is unanimously agreed that the subject of identity is open to inquiry on habeas corpus.[6] Nor do the courts hesitate to review, and reverse if necessary, the executive conclusion that the accused has been charged with a crime.[7] But as regards the determination that the relator is a fugitive from justice, a divergence appears.[8] A very few cases seem to deny all inquiry into the governor's conclusion on that point.[9] The other extreme is the position that whether or not he is a fugitive, is a question of fact to be determined on habeas corpus like any other, i. e., by a mere preponderance of evidence.[10] Midway between is the majority

[1] Art. 4, §2. [2] (1793) 1 Stat. 302, U. S. Comp. State. (1916) §10126.

[3] *Roberts* v. *Reilly* (1885) 116 U. S. 80, 6 Sup. Ct. 291; *Munsey* v. *Clough* (1904) 196 U. S. 364, 25 Sup. Ct. 282; see *Appleyard* v. *Massachusetts* (1906) 203 U. S. 222, 228, 27 Sup. Ct. 122; *Dennison* v. *Christian* (1904) 72 Neb. 703, 101 N. W. 1045, *aff'd* (1905) 196 U. S. 637, 25 Sup. Ct. 795.

[4] The courts seem tacitly to assume the third point of identity, usually mentioning the other two only.

[5] This involves somewhat the nature of the act of the governor of the state of refuge. To begin with, his duty is moral only, and he cannot be compelled to act. *Kentucky* v. *Dennison* (U. S. 1860) 24 How. 66; see *Ex parte Virginia* (1879) 100 U. S. 339, 358, 359. Generally the courts have said his duty is ministerial without the power to exercise executive or judicial discretion. *Kentucky* v. *Dennison, supra*; *In re Thompson* (1915) 85 N. J. Eq. 221, 228, 96 Atl. 102. But some have stated that he acts judicially also. *In re Greenough* (1858) 31 Vt. 279, 289. It would seem that he exercises judicial powers in view of the fact that he examines evidence and issues the warrant at his discretion. See 1 Bailey, *Habeas Corpus* (1913) 563.

[6] *People ex rel. Ryan* v. *Conlin* (1895) 15 Misc. 303, 36 N. Y. Supp. 888; *Ex parte Chung Kin Tow* (D. C. 1914) 218 Fed. 185; see *Commonwealth* v. *Hare* (1908) 36 Pa. Super. Ct. 125, 130; N. Y. Crim. Code §827.

[7] *People ex rel. Lawrence* v. *Brady* (1874) 56 N. Y. 182; *People ex rel. Jourdan* v. *Donohue* (1881) 84 N. Y. 438; *State ex rel. Stundahl* v. *Richardson* (1885) 34 Minn. 115, 24 N. W. 354.

[8] In 1885, the United States Supreme Court in *Roberts* v. *Reilly, supra,* footnote 3, p. 95, commented on the lack of harmonious decisions and authoritative judgments of that court as to how far the governor's conclusion might be judicially reviewed; and in 1906 that court, in *Appleyard* v. *Massachusetts, supra,* footnote 3, pp. 228, 229, cited the same passage as still representing the situation.

[9] *People ex rel. Ryan* v. *Conlin, supra,* footnote 6.

[10] *People ex rel. Genna* v. *McLaughlin* (1911) 145 App. Div 513, 130 N. Y.

view which occasionally expresses doubt as to the propriety of reviewing the governor's decision,[11] but generally inquires[12] subject to limitations. Thus some courts hold that where there is conflicting evidence, the prisoner will not be discharged.[13] A stronger stand is that of no review if there be any reasonable evidence that the accused was in the demanding state,[14] or if the governor had a hearing with the evidence pro and con before him.[15] In the varying language (usually dicta) of the United States Supreme Court, the prisoner should not be discharged because "the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meagre, as perhaps, to admit of a different conclusion";[16] or, he should be discharged "when it is conceded or when it is so conclusively proved that no question can be made that the person was not in the demanding state,"[17] etc., down to the latest expression, that the "conclusion must stand unless clearly overthrown."[18] These cases in general hold that the warrant of extradition makes out a *prima facie* case that the prisoner is a fugitive.[19]

The courts frequently repeat that the question whether the accused is charged with a crime is one of law and open on the face of the papers to judicial inquiry, while the question whether he is a fugitive from justice is one of fact.[20] If, upon the governor's hearing, the sole issue is whether the accused was at point A and not at point B, it is a question of fact, and when evidence pro and con has been received by the governor, it ought not be reviewed.[21] On the other hand, the prisoner admittedly may not have been physically within the demanding state at any time, and yet may have committed an act which resulted in a crime in that state.[22] Or he may have done a material act and have left before the crime was accomplished.[23] Or he may have remained in

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Supp. 458; *People ex rel. Fuchs* v. *Police Commissioner* (1914) 83 Misc. 643, 146 N. Y. Supp. 781. This was the relator's contention in the instant case where it was directly rejected. The *Genna* case cited *McNichols* v. *Pease* (1907) 207 U. S. 100, 28 Sup. Ct. 58 for the "preponderance of evidence" view, which case at another point (p. 112) said that the prisoner would not be discharged unless it was made clearly and satisfactorily to appear that he was not a fugitive. In the *Genna* case, the Special Term of the Supreme Court found the evidence clear and satisfactory. The Appellate Division said the prisoner ought to be discharged on such facts and really decides only that proposition.

[11] See *Biddinger* v. *Commissioner of Police* (1917) 245 U. S. 128, 134, 38 Sup. Ct. 41; *Katyuga* v. *Cosgrove* (1901) 67 N. J. L. 213, 214, 50 Atl. 679; *Ex parte Reggel* (1885) 114 U. S. 642, 652, 5 Sup. Ct. 1148.

[12] *Wilcox* v. *Nolze* (1878) 34 Oh. St. 320; *Jones* v. *Leonard* (1878) 50 Iowa 106; see *Ex parte Shoemaker* (1914) 25 Cal. App. 551, 144 Pac. 985.

[13] *Munsey* v. *Clough, supra,* footnote 3.

[14] *Farrel* v. *Hawley* (1905) 78 Conn. 150, 61 Atl. 502; *Ex parte Reggel, supra,* footnote 11; *People ex rel. Debono* v. *Board of Police Com'rs* (1915) 89 Misc. 248, 153 N. Y. Supp. 491.

[15] *Dennison* v. *Christian, supra,* footnote 3; see *Bruce* v. *Rayner* (C. C. A. 1903) 124 Fed. 481, 483.

[16] *Ex parte Reggel, supra,* footnote 11, p. 653.

[17] *Munsey* v. *Clough, supra,* footnote 3, p. 374.

[18] *Hogan* v. *O'Neill* (1921) 41 Sup. Ct. 222, 223.

[19] *Roberts* v. *Reilly, supra,* footnote 3; *Munsey* v. *Clough, supra,* footnote 3; *People ex rel. Genna* v. *McLaughlin, supra,* footnote 10; *McNichols* v. *Pease, supra,* footnote 10.

[20] *Munsey* v. *Clough, supra,* footnote 3, p. 372; *Appleyard* v. *Massachusetts, supra,* footnote 3, p. 228; *Roberts* v. *Reilly, supra,* footnote 3, p. 95; *People ex rel. Marshall* v. *Moore* (1915) 167 App. Div. 479, 482, 153 N. Y. Supp. 10.

[21] *Dennison* v. *Christian, supra,* footnote 3.

[22] Constructive presence does not justify extradition. *People ex rel. Corkran* v. *Hyatt* (1902) 172 N. Y. 176, 64 N. E. 825, *aff'd Hyatt* v. *People ex rel. Corkran* (1903) 188 U. S. 691, 23 Sup. Ct. 375; *In re Mohr* (1883) 73 Ala. 503; *State* v. *Hall* (1894) 115 N. C. 811, 20 S. E. 729.

[23] He need not have done every act within the state in order to be a fugitive.

the state for some time after the commission of the offense and then left, not in order to avoid prosecution but for some other purpose.[24] Clearly, in determining the legal consequences of the facts he has found in such cases, the governor decides a question of law, i. e., what constitutes a fugitive; and the courts have invariably reviewed his decision and have frequently overturned it.[25] The cases upholding the majority rule apparently follow this general line of demarcation between questions of law and fact, even though they sometimes categorically misplace them.

One difficulty with the position that the executive conclusion is not to be reviewed at all is that it makes easy an abuse of legal process. Governors have secured renditions by sending false affidavits that the accused was a fugitive from justice.[26] Viewed from this angle the problem presents another phase of the conflict between the administrative and judicial branches of the law. In many instances the overzealous administrative official exceeds his authority, and the judiciary has often shown a desire to review such acts when possible. Besides, this extreme view has arisen partly from the notion that by inquiring into the executive determination, you are examining an alibi and thus making guilt or innocence an issue. But proof that the accused had never been in a demanding state shows not only that he was not at the scene of the crime, but also that he did not flee from the state and hence that the governor had no jurisdiction to cause his arrest on extradition proceedings. Such evidence therefore is pertinent to an issue proper on habeas corpus.

On the other hand, the "weight of evidence" position ignores the summary nature of the remedy of habeas corpus. Time and again it has been announced that this writ cannot perform the function of a writ of error,[27] that the court examines only the power and authority to act and not the correctness of the conclusions.[28] Otherwise, as was pointed out in the instant case, the demanding state would have to be prepared on habeas corpus with all its affirmative evidence that the accused was in the state, in order to have the privilege of retrying the issue later.

The majority doctrine seems eminently sensible. The policy of liberal construction of the rendition statutes so as to effectuate their purpose[29] would be nullified if discharge were made too easy to procure; yet at the same time, the court should have the discretion of review in order to rectify obvious mistakes and cases of bad faith and so safeguard the liberties of the innocent.

Strassheim v. *Daily* (1911) 221 U. S. 280, 31 Sup. Ct. 558; *Ex parte Finch* (Neb. 1921) 182 N. W. 565.

[24] He need only have committed the act and have been found later in the refuge state when sought to be subjected to prosecution. *McNichols* v. *Pease, supra,* footnote 10; *Appleyard* v. *Massachusetts, supra,* footnote 3.

[25] *Hyatt* v. *People ex rel. Corkran, supra,* footnote 22.

[26] *Pettibone* v. *Nichols* (1906) 203 U. S. 192, 27 Sup. Ct. 111; *In re Moore* (D. C. 1896) 75 Fed. 821. It is a rule, as laid down in these cases, that a prisoner must stand trial although brought from another state by violence or other unlawful means. N. Y. Crim. Code §827 makes abduction without proper extradition proceedings a crime.

[27] See *Glasgow* v. *Moyer* (1811) 225 U. S. 420, 428, 32 Sup. Ct. 753.

[28] See *Matter of Gregory* (1910) 219 U. S. 210, 213, 31 Sup. Ct. 143.

[29] See *Appleyard* v. *Massachusetts, supra,* footnote 3, p. 228; *Biddinger* v. *Commissioner of Police, supra,* footnote 11, p. 133.